Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Petitioners,

vs.

TALISMAN ENERGY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether under this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), federal common law tort principles or international law provides the standard for civil aiding and abetting or conspiracy liability under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350.

2. Whether the mental element for civil aiding and abetting liability, under either federal common law or international law, permits liability based on a showing that the defendant knowingly provided substantial assistance to gross human rights violations, or whether a plaintiff must also show that the defendant had the purpose to assist such human rights violations.

3. Whether ATS plaintiffs may assert conspiracy or joint criminal enterprise theories of liability based on federal common law or international law and, if so, whether in the context of such joint action, ATS plaintiffs satisfy their burden of proof by demonstrating that the defendant knew of an illegal purpose of the joint criminal enterprise and that it was assisting in achieving that illegal purpose.

PARTIES TO THE PROCEEDING

All parties or petitioners are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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The Presbyterian Church of Sudan, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at 582 F.3d 244 (2d Cir. 2009). The court of appeals' order denying plaintiffs' timely petition for rehearing and for rehearing en banc (App. C-1) was entered November 30, 2009. The opinion of the district court (App. B-1) is reported at 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on October 2, 2009. A timely petition for rehearing and for rehearing en banc was denied on November 30, 2009. Justice Ginsburg granted petitioners' application for an extension of time to file this petition on April 15, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

1. This lawsuit was filed by the Presbyterian Church of Sudan and representative named plaintiffs on behalf of a putative class of non-Muslim residents of southern Sudan. The plaintiffs were attacked by the Sudanese military and militia groups it controlled because they lived in areas identified for oil exploration and development by Talisman Energy, Inc. ("Talisman") and its joint venture partner the Government of Sudan ("GOS").

Talisman joined an existing joint venture with full knowledge that the joint venture depended on and supported GOS military attacks against civilians to expand its oil exploration and production operations. No exploration operations were undertaken before a "buffer zone" was established by coordinated ground and air assaults against the non-Muslim civilian population. Talisman supported the joint venture's "buffer zone" security strategy by: coordinating oil exploration activity with the GOS military; hiring and deploying military advisers to work with the joint venture security staff and GOS military; providing financial resources to a government-aligned militia involved in these attacks; and constructing and maintaining improved airfields where the GOS military based the Antonov bombers and helicopter gunships used for these attacks.

This petition seeks review of the Second Circuit's decision affirming summary judgment in

favor of Talisman.[1] The Second Circuit held that plaintiffs' ATS claims failed because there was no proof that Talisman shared the purpose of committing these human rights violations against plaintiffs, despite evidence of the joint venture's buffer zone strategy. As a consequence, the Second Circuit became the first and only circuit to hold that liability under the ATS does not extend to defendants who knowingly provide practical assistance that has a substantial effect on the commission of such egregious human rights violations.

The Second Circuit's ruling conflicts with this Court's repeated application of general tort rules of liability to give effect to federal causes of action, which should govern liability in this case. The court's holding that the mental element for accessorial liability is purpose under international law, rather than knowledge, also conflicts with more than sixty years of international law jurisprudence dating back to Nuremberg. Contrary to the history and purpose of the ATS, the Second Circuit's new rule will prevent plaintiffs, as a practical matter, from obtaining redress for complicity in violations of paradigmatic human rights norms of central importance to the international community and this country. The Second Circuit's proposed rule will undermine the

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[1] Talisman is a multinational oil and gas corporation headquartered in Calgary, Alberta, Canada. It does substantial business in the United States and in New York State. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2004 U.S. Dist LEXIS 17030, at **7-8 (S.D.N.Y. Aug. 30, 2004) (finding personal jurisdiction).

accountability of those who have facilitated genocide, war crimes and crimes against humanity.

The Second Circuit's decision warrants review on certiorari for three reasons.

First, the Second Circuit held that international criminal law governs the standard for civil aiding and abetting liability under the ATS. That holding is inconsistent with this Court's decision in *Sosa v. Alvarez-Machain,* 542 U.S. 692, 724 (2004), that civil claims under the ATS are based upon federal common law. The Second Circuit's holding is in direct conflict with the Eleventh Circuit, which has consistently recognized clearly established federal common law standards for civil aiding and abetting liability under the ATS. *Cabello v Fernandez-Larios,* 402 F. 3d 1148, 1158-59 (11th Cir. 2005).

Second, even if the Second Circuit was correct in relying on international criminal law to find the standard for civil aiding and abetting liability, it fundamentally misconstrued international law by imposing a shared or common "purpose" *mens rea* standard, akin to specific intent, that is not applicable to accomplice liability. From the Nuremberg trials to the present, the *mens rea* for criminal aiding and abetting liability in international law has been knowledge that one's assistance will have a substantial effect on the commission of a crime.[2] There is no requirement that the accomplice

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[2] See, e.g., *Trial of Bruno Tesch and Two Others (The Zyklon B Case),* 1 Law Report of Trials of War Criminals 93

share the *mens rea* of the direct perpetrator. Thus, review is essential to ensure that federal courts uniformly apply the correct international standard in ATS cases.

Finally, conspiracy liability is a well-established theory of civil liability in federal common law. The Second Circuit's reliance on international law for conspiracy liability standards is inconsistent with *Sosa* and in direct conflict with the Eleventh Circuit's application of federal common law principles of conspiracy liability in ATS cases. *Cabello*, 402 F. 3d at 1159. Review is necessary to resolve this conflict and to determine the proper international standard, if applicable.

This case presents an appropriate and timely vehicle for the resolution of these questions, which have vexed the lower courts both prior to and since this Court's decision in *Sosa*. This case comes before this Court on a full evidentiary record after complete discovery, thus, providing context for the legal issues at stake. The issues of the source of law and the standards for civil aiding and abetting and conspiracy liability under the ATS are the dispositive issues upon which the Second Circuit affirmed summary judgment, so these issues are squarely before this Court.

(1947)(Brit. Mili. Ct., Hamburg, Mar. 1-8, 1946); *Prosecutor v Furundzija*, Case No. IT-95-17/1/T, Judgment, ¶ 236 (Dec. 10, 1998).

2. The dispositive issue is whether the Second Circuit adopted the proper legal standards, especially with respect to the mental element for civil aiding and abetting and conspiracy liability. Remand is necessary for the lower courts to re-evaluate the summary judgment record under the proper legal standards.[3] A brief summary of the record is provided below as context for the legal issues presented in this petition.

In 1998, Talisman entered into a joint venture with the GOS[4] to construct an oil pipeline and to explore and develop oil and gas reserves in a vast concession area in southern Sudan.[5] Before doing so,

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[3] The lower courts questioned whether some of the actions upon which plaintiffs based their claims could be attributed to defendant Talisman. However, this issue was not the basis for the Second Circuit's affirmance of the summary judgment. On remand, there would have to be a determination of whether Talisman's actions amounted to substantial assistance under the proper standard.

[4] In 1997, the United States government designated the GOS as a state sponsor of terrorism. In 2002, President Bush signed the Sudan Peace Act ("SPA"), Pub. L. No. 107-245, 50 U.S.C. §1701 note (2002), which, *inter alia*, found that Sudan has been systematically engaged "in a low-intensity ethnic cleansing" to destroy the societies, cultures and economies of the Dinka, Nuer, and Nuba peoples, SPA § 4(2). J.A. 014019.

[5] Talisman entered into the joint venture by taking over the position held by Arakis, Inc., another Canadian corporation. (App. B-16) Talisman entered into the joint venture directly and then reorganized the formal investment entities for corporate tax purposes by transferring its interest in the joint venture to a chain of international subsidiary

Talisman's senior management team investigated the joint venture's operations and learned that joint venture operations were conducted behind a buffer zone created by the GOS military at the request of the joint venture partners.[6] Talisman learned that the joint venture partners routinely coordinated all exploration and drilling activities with the Sudanese military so that the buffer zone could be created by violently clearing the non-Muslim civilian population prior to the commencement of designated joint venture operations.[7] Most critically, Talisman

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companies. *See, e.g.*, J.A. 015601 (20:2-19) (deposition of Talisman official describing the structuring Talisman's Sudanese assets for tax purposes). The joint venture partners maintained direct control of the joint venture project through partnership committees. These partnership committees, in which Talisman officials participated actively, in turn directed the operations of the Greater Nile Petroleum Operating Company, Ltd. ("GNPOC"), which was created as a conduit by the partners to coordinate operations on the ground. J.A. 012772 (report stating that international oil companies operate under the auspices of GNPOC, which is an agent sponsored mainly by the GOS).

[6] J.A. 013137 (Talisman CEO informs board of the extent of GOS military presence on project); J.A. 010955 (report by Talisman military consultant that "[t]he military strategy, driven it appears by GNPOC security management, is to create a buffer zone, i.e. an area surrounding both Heglig and Unity camps inside which no local settlements or commerce is allowed.").

[7] J.A. 013883 (61:1-13) (Talisman seconded employee based in Sudan attended daily meetings with GOS military and joint venture security personnel at which exploration and drilling operations were coordinated with GOS military); J.A.

learned that, if it joined the joint venture, it would inevitably be a participant in such violations because the creation of the buffer zone by violent attacks and forced displacement of the non-Muslim population in these areas were essential components of the joint venture's oil exploration and production plan.[8]

The joint venture, using the GOS military, cleared the area of civilians through a series of coordinated air and ground attacks against the non-Muslim civilian population.[9] Prior to the exploration and development of any part of the concession, the GOS military, including militias controlled by the GOS, burned villages and conducted brutal military operations to drive the non-Muslim population into the wilderness without food, shelter or clean water.[10]

013745 (352:04-06) (Vice President of Sudan informs Talisman CEO that 400,000 people had been displaced in or near the concession area by GOS).

[8] J.A. 015166-69 (Talisman management informed that the GOS and joint venture used the GOS military to remove civilians forcibly to create a buffer zone for oil exploration).

[9] J.A. 002271 (U.N. Special Rapporteur report describing forcible population displacement to clear oil producing areas); J.A. 002282 (Canadian government report summarizing evidence linking oil development by the Talisman joint venture with the forced displacement of civilians).

[10] J.A. 013758 (157:12 - 158:20) (Governor of Unity State, Taban Deng Gai's deposition) (GOS cleared villages "using any means from a small rifle shooting to artillery shooting to tank attack, to usage of helicopter gunship to usage of aircraft bombardment and using the Antonov bombers. That

Talisman directly supported the GOS-controlled militias, knowing that they were perpetrating attacks against civilians, to facilitate joint venture operations.[11]

During the time that Talisman was a joint venture partner, GOS Antonov bombers and helicopter gunships indiscriminately bombed and strafed civilian villages from bases built and controlled by the joint venture to provide air support for the ground troops engaged in implementing the

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was at the request of Talisman . . . .").

[11] J.A. 12580 (The militias are part of the joint venture's security strategy.); J.A. 013888 (186:12-187:18) (testimony that the GOS military and the militia attacked Nialdiu and Mankien villages on orders from the joint venture). Thousands of non-Muslim civilians were killed and injured in these attacks and numerous churches were destroyed to clear areas for oil exploration and development. One of the plaintiffs, Luka Ayuol Yol, a Roman Catholic catechist, was singled out for torture during one of these attacks. J.A. 013443-44 (103:18-108:11). Even a World Food Organization distribution center was targeted in these attacks. J.A. 003016-17 (Talisman report on the gunship attack at Bieh village). After joining the joint venture, Talisman received regular reports from its own employees based in Sudan about continuing human rights violations in and near the concession area that occurred because of the joint venture's oil exploration and development activities. *See, e.g.*, J.A. 011827-29 (Talisman Security Update reporting that gunships were still operating from the joint venture's Unity airstrip and discussing a major offensive by militia with gunship support).

joint venture's buffer zone strategy.[12] The GOS bombers and helicopter gunships were routinely refueled and re-armed at the joint venture airfields, Heglig and Unity, with joint venture fuel, and their crews were quartered there.[13] Talisman made direct payments to expand and upgrade these airfields knowing that they were being used to launch attacks against the local civilian population.[14]

3. This litigation originated as a class action against Talisman filed on November 8, 2001 by two

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[12] J.A. 010933 (Sudan's Minister of External Relations' statement that the Heglig airport is owned and administered by the oil exploration companies and that security measures in the oil fields are being provided at the request of the companies); J.A. 012941 (Talisman's senior executive in Sudan informed senior Talisman management: "They (GOS) will continue bombing anyway and we would look foolish telling them to stop bombing (they don't have the facility to do accurate bombing.")).

[13] J.A. 012360 (describing how the airstrip and helipad are being used to conduct operations in the war area and how 500 pound bombs are loaded onto Antonovs operating out of the joint venture's Heglig airfield along with the helicopters). *See also* J.A. 013867-880 (Talisman employee Lawrence O'Sullivan's deposition); J.A. 013871 (100: 9-13) (There was a military camp at Unity.); J.A. 013878 (183:11-15) (O'Sullivan saw gunships refuel at Unity.).

[14] J.A. 003092 and J.A. 003100 (documents authorizing expenditures by Talisman for improvements to the airstrips); J.A. 003297 (257:3-260:18) (Talisman CEO Buckee's testimony acknowledging that the GOS' Antonovs and gunships used the Heglig and Unity airstrips for bombing purposes); J.A. 012909 (Talisman report stating that there has been an increase in the use of the Heglig and Unity airstrips by the GOS military).

organizations, including the Presbyterian Church of Sudan, and thirteen individuals, including two Presbyterian ministers and four Nuer and Dinka tribal chiefs.

The district court denied Talisman's motion to dismiss. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) ("*Talisman I*"). After this Court's 2004 decision in *Sosa*, Talisman renewed many of its prior arguments in a motion for judgment on the pleadings. The district court denied this motion. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005)("*Talisman II*"). In both of these rulings, the district court applied the correct mental element of knowledge in reaching its conclusions. *Talisman I*, 244 F. Supp. 2d at 322-24; *Talisman II*, 374 F. Supp 2d at 340. After discovery was completed, Talisman moved for summary judgment, which the district court granted. (App. B-8) For the first time, the district court applied a heightened mental element in its analysis of Talisman's aiding and abetting liability. (App. B-69) Plaintiffs appealed.

The Second Circuit held (1) that international criminal law, rather than federal common law, provides the standard for aiding and abetting liability, and (2) that based on its reading of the Rome Statute of the International Criminal Court ("ICC"),[15] proof of a shared purpose is required to

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[15] Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998).

prove civil aiding and abetting liability under the ATS. (App. A-29) The court of appeals then held that plaintiffs had not introduced evidence that Talisman's purpose was to facilitate the violations it knew were being committed by the GOS against plaintiffs, App. A-2, 32-41, and affirmed the dismissal of plaintiffs' aiding and abetting claims on that basis. App. (A-2) The Second Circuit also found that conspiracy liability was governed by international law, not federal common law. (App. A-32) Because the court believed that international conspiracy or joint criminal enterprise standards required the same showing of "purpose" as aiding and abetting liability required, it similarly affirmed the dismissal of plaintiffs' conspiracy claims. *Id.*

Plaintiffs filed a petition for rehearing, or rehearing en banc, on October 28, 2009. A large number of *amici curiae*, including the chief U.S. negotiator at the Rome Conference establishing the ICC, Ambassador David Scheffer, submitted briefs demonstrating, *inter alia*, that the court of appeals had misinterpreted international law. The court of appeals refused to allow any of these briefs to be filed, (App. D-1), and denied plaintiffs' petition for rehearing on November 30, 2009. (App. C-1)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE ISSUES OF NATIONAL AND INTERNATIONAL IMPORTANCE, WHICH NOW DIVIDE THE FEDERAL COURTS, CONCERNING THE SOURCE OF LAW AND STANDARD FOR CIVIL AIDING AND ABETTING LIABILITY UNDER THE ATS.

The courts of appeals are split over both the source and the substance of the proper standard for civil aiding and abetting liability under the ATS. The Second Circuit's holdings — (1) that the proper standard for aiding and abetting liability is found in international law, and (2) that the proper mental element to be applied in such cases is a shared or common purpose — are in direct conflict with a line of decisions issued by the Eleventh Circuit and the overwhelming majority of district courts that have considered the issue.

Specifically, the Eleventh Circuit has applied civil federal common law tort principles to aiding and abetting liability in ATS cases. *See Cabello*, 402 F.3d at 1159.[16] It has also determined that the proper mental element in such cases is the defendant's knowledge that its practical assistance would have a substantial effect on the commission of a human

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[16] *See also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005).

rights violation that is sufficiently grave to be actionable under *Sosa*. *Id.*[17] The Second Circuit's decision is also in conflict with many district court decisions on this issue which hold that knowledge is the mental element for aiding and abetting under the ATS.[18] Finally, the Second Circuit's decision is also

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[17] The Ninth Circuit was divided in its only case to address this issue. *Doe v. Unocal*, 395 F.3d 932, 950-51 (2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). Two members of the *Unocal* panel held that international law provided the standard for aiding and abetting liability and that the international customary law standard was knowledge, 395 F.3d at 949-50, while observing that this standard was similar to the domestic common law standard. *Id.* at 948 n. 23, 951. The third member of the panel found that federal common law applied to this and other issues under the ATS. *Id.* at 963, 965. The Ninth Circuit granted en banc review to determine the proper source of law (federal common law or international law) for the aiding and abetting standard. The parties settled the *Unocal* case before this issue was resolved en banc. *Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005). Prior to the *Talisman IV* decision the Second Circuit was similarly divided, holding that aiding and abetting liability is recognized under the ATS but disagreeing on the source of law and standard to be applied. *See Khulumani v. Barclay's Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., international criminal law applies); *id.* at 286 (Hall, J., concurring and finding that federal common law applies).

[18] *See, e.g., Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-294 (E.D.N.Y 2007); *Bowoto v. Chevron Corp.*, No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at * 17-19 (N.D. Cal. Aug. 21, 2006); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005); *Doe v. Saravia*, 348 F. Supp 2d 1112, 1148-48 (E.D. Cal. 2004);

inconsistent with this Court's instruction in *Sosa* that federal common law defines the liability standards in ATS cases. *Sosa*, 542 U.S. at 724.

This case presents a particularly compelling vehicle to resolve these issues, because the mental element (1) has been briefed extensively below, including by numerous *amici*; (2) was decided on the basis of a full evidentiary record after complete discovery; and (3) was the central reason for the court of appeals' affirmance of the summary judgment.

Resolution of these issues would be in the interests of ATS plaintiffs, corporate defendants,[19] and interested governments alike.[20] Corporations doing business in New York and Atlanta are now subject to two different standards for accessorial liability under the ATS. There are approximately two dozen pending ATS cases alleging that corporations, U.S. and foreign, have aided and abetted serious human rights violations committed in other

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Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

[19] Numerous corporations previously requested that this Court resolve these issues in *Khulumani v. Barclay Nat'l Bank Ltd.*, Petition for Writ of Certiorari, *sub nom, Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

[20] The United States and a number of foreign governments have filed *amicus curiae* briefs in this case and other ATS cases raising this issue.

countries.[21] These cases often arise in the context of widespread human rights violations condemned by the international community and the U.S. Government. This case is a paradigmatic example of rare but real corporate behavior that conflicts with the most important norms established by the international community — the prohibition against the mass killing of and attacks on civilians.

Corporate defendants have claimed that they are being punished for merely "doing business" with repressive regimes and that such lawsuits interfere with "constructive engagement" or foreign investment. However, knowingly providing practical assistance to the perpetrators of international crimes is not excusable as merely "doing business" with repressive regimes and, hence, aiding and abetting such crimes is an appropriate and well-established basis for civil liability under the ATS. The United States, during the George W. Bush Administration, filed *amicus* briefs, including a brief in this case, opposing civil aiding and abetting liability in ATS cases.[22] The Obama Administration has not yet

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[21] The pending cases in which aiding and abetting liability is at issue include *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. argued Jan. 11, 2010) (South Africa); *Mujica v. Occidental Petroleum, Inc.*, 564 F.3d 1190 (9th Cir. 2009)(appeal pending) (Colombia); *Doe v. Exxon*, 658 F. Supp. 2d 131 (D.D.C. 2009), appeal docketed, No. 09-7125 (D.C. Oct. 29, 2009) (Indonesia). In each of these cases there have been submissions by the United States and foreign governments.

[22] *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Talisman*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016).

expressed its views on these issues.[23] Despite this Court's request for Congressional guidance in *Sosa*, 542 U.S. at 731, Congress has not taken action to amend the ATS.[24]

The national and international importance of the issues raised by this petition has been recognized by corporations, human rights advocates, victims, and numerous governments. The international community has displayed a keen interest in corporate complicity cases under the ATS.[25] This Court's timely

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[23] This Court has requested the views of the United States concerning the pending petition for writ of certiorari in another ATS case. *Pfizer Inc. v. Abdullahi*, 130 S. Ct. 534 (Nov. 2, 2009) (No. 09-34) (mem.). However, that petition does not raise the issue of aiding and abetting liability, which is the most important issue in dispute in almost all corporate ATS cases. Petition for Writ of Certiorari, *Pfizer Inc. v. Abdullahi*, No. 09-34 (July 8, 2009).

[24] In fact, in the context of efforts to contain international terrorism, Congress has expressly codified a knowing practical assistance standard for aiding and abetting liability. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(o), 115 Stat. 224 (2001).

[25] For example, the United Nations Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Harvard Professor John Ruggie, has addressed the standards for corporate complicity in his reports. *See, e.g.*, The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, April 7, 2008. Indeed, Professor Ruggie has stated that the Second

resolution of the fundamental issues raised by the petition would benefit all interested parties.

The Second Circuit's decision has no basis in the language, history, or purpose of the ATS, or in this Court's decision in *Sosa*. It is a standard that effectively provides *de facto* immunity from ATS liability for corporations and amounts to an amendment to the ATS by judicial action in an arena Congress has not seen fit to enter. Contrary to one of the primary original purposes of the ATS, the Second Circuit's decision, if followed, ensures that corporate aiding and abetting cases would be heard in state courts. Such an outcome would handicap the ability of the federal courts to ensure the uniform application of international customary law in U.S. courts.

Finally, even if this Court agrees that international law governs the issue of aiding and abetting or conspiracy liability under the ATS, it is important that U.S. courts apply the correct international law standards. Review is necessary to ensure that the federal courts apply accepted principles of international law in ATS cases, and not the erroneous standards applied by the court of appeals.

Circuit misinterpreted international standards in applying a "purpose" standard. John Ruggie, Remarks Prepared for ICJ Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009).

II. REVIEW IS NECESSARY BECAUSE THE SECOND CIRCUIT ERRED IN APPLYING INTERNATIONAL LAW TO THE ISSUE OF AIDING AND ABETTING LIABILITY, DESPITE THIS COURT'S RULING IN *SOSA* THAT SUCH RULES ARE GOVERNED BY FEDERAL COMMON LAW.

A. Under This Court's Decision in *Sosa*, Federal Common Law Provides the Rules of Liability in Alien Tort Statute Cases.

Review is necessary because the Second Circuit's decision is in conflict with this Court's reasoning in *Sosa* that the rules of liability in ATS cases are derived from federal common law. The Second Circuit's decision provides no compelling rationale for applying international law to the issues of aiding and abetting or conspiracy liability. This Court should reaffirm the applicability of federal common law to these issues.

In *Sosa*, this Court held that "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability," *Sosa*, 542 U.S. at 724. This Court further described the test for determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. *Sosa* clearly identifies customary international law as the source of law to define primary violations actionable under the ATS, but it

is federal common law itself that provides the liability standards for those complicit in such violations.

The history this Court relied on in *Sosa* further suggests that the Founders expected that common law principles would supply the rules by which ATS cases would be litigated.[26] This approach would have been essential to implement the ATS, because international law did not supply the rules and standards by which tort litigation was conducted in 1789. This remains true today.

Certain issues arising in ATS cases (such as diplomatic immunity) are governed by treaty or statute. Based on this Court's analysis in *Sosa* and the history of the ATS, the rules for issues where there is no governing treaty or statutory provision should be governed by federal common law.

In the early years of the Republic, courts routinely applied the common law in cases involving the law of nations. *See Sosa* Historians' Brief, at ** 11-13. Attribution of liability was, therefore, governed by the common law, which included the law of nations.[27] Civil aiding and abetting was well

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[26] *Sosa*, 542 U.S. at 724. Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339)("*Sosa* Historians' Brief").

[27] *See, e.g., Talbot v. Janson*, 3 U.S. 133, 156-58 (1795) (holding defendant liable for violation of international law of neutrality, and applying principles of aiding and abetting

established at common law. *See, e.g., Thomlinson v. Arriskin*, (1719) 92 Eng. Rep. 1096 (K.B.) (noting that one who aids trespass is liable as a trespasser). There were no universally accepted international standards for aiding and abetting piracy in the 18th century. 4 William Blackstone, Commentaries on the Laws of England, 72 (1769). However, there is no doubt that a defendant who provided the necessities for a pirate expedition, knowing of the purpose of the expedition, would be liable for aiding and abetting piracy. Attorney General Bradford, not long after the ATS was enacted, understood this principle and thus referred to the availability of aiding and abetting liability under the ATS with respect to possible claims against U.S. nationals involved in an attack on the British colony in Sierra Leone. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795). Applying federal common law to such issues is, thus, most consistent with the original understanding of the drafters.

International law itself counsels against looking for substantive international law complicity norms. In 1789, as now, it was well-established that "international law does not specify the means of its domestic enforcement." *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). As the Second Circuit has previously noted, international law "leaves to each

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without searching international law); *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa 1830) (recognizing common law rule of self defense would exonerate defendant alleged to have infringed on foreign minister's inviolability of person, even though that right is conferred under the law of nations).

nation the task of defining the remedies that are available for international law violations." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); *accord Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). The principle that international law itself need not provide a right to sue, which was discussed in detail by Judge Edwards in *Tel-Oren*, 726 F.2d at 777-82 (Edwards, J., concurring), was adopted by *Sosa*, 542 U.S. at 724, 731. Judge Bork's contrary view in *Tel-Oren*, 726 F.2d at 801-08 (Bork, J., concurring) was expressly rejected. *Sosa*, 542 U.S. at 731.

Moreover, international law simply does not address all of the issues necessary to litigate tort cases in domestic courts. Tort liability is primarily a concern for domestic enforcement, not international tribunals, and the Founders — by utilizing common law tort liability in the ATS to enforce the law of nations — created an effective, immediately enforceable means of fulfilling our Nation's obligations to enforce the law of nations.[28]

Sosa held that the ATS grants jurisdiction over causes of action present in federal common law. 542 U.S. at 732. The only question for which *Sosa* requires reference to international law is whether there has been a "violation of [an] international law

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[28] Anne Marie-Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).

norm." *Id.* The question of whether a defendant is liable for participating in such a violation is ancillary to the question of whether there has been a violation of an international norm; it does not affect the determination of whether the plaintiff's rights have been violated. While the *right* violated comes from international law, Congress has provided for tort remedies in the ATS, and the scope of this *remedy* is a question of federal common law.

Once an "alien" plaintiff has stated a tort claim for a violation of a *Sosa*-qualifying violation of the "law of nations," federal courts have jurisdiction over the claim. Accessorial rules such as aiding and abetting, by contrast, are not part of a distinct "norm or violations of the law of nations." *See Khulumani*, 504 F.3d at 280-81 (Katzmann, J., concurring) (explaining that "aiding and abetting is a theory of liability for acts committed by a third party," not "an offense in itself").

The Second Circuit declined to apply federal common law in this case, reasoning that *Sosa* points to "international law to find the standard for accessorial liability" because "secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." App. A-30. The court believed that footnote 20 in *Sosa*, which the court of appeals conceded referred to a different issue, supported the "broader principle that the scope of liability for ATS violations should be derived from international law." App. A-29. The court of appeals' "importance" standard for choosing between international and federal common law in resolving

choice of law issues has no basis in the language, history, or purpose of the ATS and is in conflict with *Sosa*.

Footnote 20 in *Sosa* related only to the issue of whether the "law of nations" violation asserted by an ATS plaintiff extended liability directly to private parties or whether the norm required state action.[29] Footnote 20, as the court of appeals recognized, did not deal with accessorial liability or what source of law applies to that issue in ATS cases. The issue of accessorial liability was not before this Court in *Sosa*. The Second Circuit's misinterpretation of footnote 20 is directly contrary to the careful historical analysis and limits central to this Court's holding and reasoning in *Sosa*. This Court should grant the writ to resolve the conflict between the Second and Eleventh Circuits and to hold that federal common law's civil tort principles provide the standard for civil aiding and abetting liability under the ATS.

B. Under Federal Common Law, the Civil Standard for Aiding and Abetting Liability is Knowing Assistance.

This Court typically applies general tort rules of liability to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*,

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[29] *Sosa*, 542 U.S. at 732 n. 20 (citing to *Tel Oren* , 726 F.2d 774 and *Kadic*, 70 F.3d. 232, two cases which address the state action issue).

451 U.S. 630, 641 (1981). Generally, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Under these common law rules, it is well-established that the mental element for civil aiding and abetting civil liability is *knowingly* providing practical assistance that has a substantial effect on the commission of the tort. Aiding and abetting civil tort liability attaches where a third person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." Restatement (Second) of Torts § 876(b) (1979); *see Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

The Eleventh Circuit has adopted this federal common law tort standard for aiding and abetting liability in ATS cases, finding that to establish liability for aiding and abetting, plaintiffs must plead that (1) wrongful acts were committed; (2) the defendant substantially assisted the person who committed or caused the wrongful acts; and (3) the defendant knew that his or her actions would assist in the illegal or wrongful activity at the time the assistance was provided. *Cabello*, 402 F.3d at 1158.

By adopting civil tort principles for aiding and abetting liability, the Eleventh Circuit did not adopt idiosyncratic principles unique to American law. The factors set forth in Restatement § 876(b) and *Halberstam* are virtually identical to the factors for aiding and abetting liability in international criminal law. It is only because the Second Circuit

misinterpreted international law that the choice between federal common law and international law on this issue matters in this case.

The Second Circuit's introduction of criminal *mens rea* requirements derived from the uninterpreted statute of a single international criminal tribunal is in conflict with the First Congress' intent to provide civil tort remedies for violations of the law of nations. The Founders knew the difference between civil tort remedies and criminal law, as this Court recognized in *Sosa*. 542 U.S. at 714. Moreover, in enacting the ATS, the Founders intended to allow civil tort cases implicating international law to be litigated in the federal courts. *Sosa* Historians' Brief, at *2-3. Applying a more restrictive aiding and abetting standard than the common law standard would have the opposite effect, ensuring that many such cases would only be litigated in state courts. Thus, applying these common law tort principles in ATS cases accords with the history, purpose and language of the ATS.

III. EVEN IF INTERNATIONAL CRIMINAL LAW PROVIDES THE APPLICABLE STANDARD FOR AIDING AND ABETTING LIABILITY, REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH INTERNATIONAL LAW AND WITH THE DECISIONS OF OTHER COURTS THAT HAVE APPLIED INTERNATIONAL LAW IN THIS CONTEXT.

Even if international criminal law does provide the standard for aiding and abetting liability, the court of appeals fundamentally misconstrued the international standard. Under customary international law, a criminal defendant may be found guilty for aiding and abetting when he knows that his acts of assistance have a substantial effect on the violations. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Dec. 10, 1998).[30]

The Second Circuit's holding that the mental element requires a common or shared purpose is based on a fundamental misinterpretation of the

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[30] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has been directed by the Security Council to apply norms that "are beyond any doubt customary law." The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) on the Establishment of the ICTY*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993). The discussion of the customary international law standards for criminal aiding and abetting liability in *Furundzija* is comprehensive and has been followed by the ICTY and International Criminal Tribunal for Rwanda ("ICTR") for more than a decade.

standard for accessory liability since Nuremberg. Under the Second Circuit's rule, industrialists convicted after World War II for aiding and abetting Nazi crimes might not be found civilly liable to their victims.

Even if international criminal law provides the standard for aiding and abetting liability, review in this Court is necessary to determine the proper standard.

A. Knowledge Was the *Mens Rea* Required For Aiding and Abetting Liability at Nuremberg.

The overwhelming weight of authority from the International Military Tribunal ("IMT") at Nuremberg, and subsequent zonal trials held by the United States and its allies under Control Council Law No. 10, establishes that knowledge, not purpose, is the *mens rea* standard for criminal aiding and abetting liability under international law. For example, two top officials of the firm that supplied the poison Zyklon-B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance using the Nuremberg principles established by the IMT. *See Zyklon B Case, supra.*[31]

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[31] As the ICTY found, the officials' purpose was to sell Zyklon-B for profit, which, since Zyklon-B also had lawful uses, could have been a lawful goal pursued by lawful means. *Furundzija*, at ¶ 238. The "charge as accepted by the court was that they knew what the buyer in fact intended to do with the

In the subsequent Nuremberg Military Tribunals ("NMT") held by the United States under Control Council Law No. 10, the *mens rea* for aiding and abetting liability again was knowledge, not purpose. In the *Einsatzgruppen* case [Trial No. 9], two defendants were convicted under a knowledge standard.[32] Similarly, in *United States v. Flick* [Trial No. 5], the NMT convicted industrialists Flick and Steinbrinck, in part, because they contributed financial support to the S.S. with knowledge of the crimes the S.S. was committing, even though they did not condone those crimes. 6 Tr. War. Crim., 1217-22 (1952). The NMT held that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of international law] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *Id.* at 1222.

The Second Circuit ignored all of these precedents. Instead, it relied exclusively on its misinterpretation of *The Ministries Case*[33] [Trial No. 11] to conclude erroneously that purpose was the

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product they were supplying." *Id. See also* Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 181-82 (1995).

[32] *United States v. Ohlendorf (The Einsatzgruppen Case)*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Tr. War Crim."), 1, 569, 572-73 (1949).

[33] *United States v. Von Weizsacker (The Ministries Case)*, 14 Tr. War Crim. 308 (1949).

standard applied at Nuremberg. (App. A-31) However, defendant Karl Rashe's acquittal was based on the Tribunal's conclusion that making a loan did not amount to criminal conduct and was, thus, an insufficient *actus reus*, not on any determination that the *mens rea* standard was purpose. Thus, *Ministries* applied the principle that knowledge is the proper *mens rea* for criminal aiding and abetting liability.

The Second Circuit's decision, therefore, undermines Nuremberg principles by requiring an even higher standard than was used to impose criminal liability, including the death penalty.[34] This heightened standard would make it difficult to impose civil liability on defendants found guilty for Nazi crimes. Left unaltered, the Second Circuit's decision will weaken international standards in both domestic and international fora.

B. Modern International Criminal Tribunals Have Consistently Found Knowledge to be the *Mens Rea* for Aiding and Abetting Liability Under Customary International Criminal Law.

Knowledge is the well-established *mens rea* for aiding and abetting liability applied in contemporary international criminal tribunals, which have been instructed to apply customary international law. The

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[34] For example, in the *Zyklon-B* case, defendants Tesch and Weinbacher were convicted based on knowledge and thereafter executed. *Zyklon-B*, at 102.

court of appeals erred in finding that "no [sufficient international] consensus exists for imposing liability on individuals who knowingly (but not purposefully) aid and abet a violation of international law." App. A-30. This statement is simply wrong. Applying the jurisprudence of Nuremberg, the ICTY, and the ICTR have consistently held that the *mens rea* for aiding and abetting in customary international law is knowledge.[35]

The ICTY, after undertaking a "detailed investigation" of post-World War II case law, found that knowledge was the accepted *mens rea* for aiding and abetting liability.[36] The ICTY has adhered to this view of the *mens rea* for aiding and abetting under customary international law from its first case to the present, in decisions by both the Trial and

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[35] *See Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring). Restatement (Third) of Foreign Relations, § 103(2) (1987). *See generally*, Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L. J. 61, 86-96, 103 (2008).

[36] *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶321, 326-29 (Nov. 16, 1998); *see also Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶229 (Jul. 15, 1999); *Furundzija*, ¶ 245 (finding that "the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."). The ICTR has also recognized a knowledge standard for the *mens rea* element for criminal aiding and abetting liability. *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 501 (Dec. 13, 2004).

Appellate Chambers, and in decisions handed down after the adoption of the Rome Statute.[37]

This consistent line of case law from the international tribunals, in applying the knowledge standard, demonstrates a clear consensus in customary international law. The ICTY is required by Security Council decision to apply universally accepted principles, unlike the ICC whose work is governed by a treaty negotiated by the parties. Thus, ICTY decisions are intended to reflect the law of nations. The Second Circuit ignored these essential precedents and offered no reason for doing so.

C. The Rome Statute Does Not Alter Customary International Law.

In relying on its mistaken reading of the Rome Statute to determine that the *mens rea* for civil aiding and abetting liability is shared purpose, the Second Circuit departed from sixty years of customary international law that establishes a *mens rea* of knowledge.

The Rome Statute did not supersede this comprehensive body of international jurisprudence. The Rome Statute established a unique court with a specific mandate and limited jurisdiction, and was

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[37] *See, e.g.*, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgement, ¶ 94 (Feb. 26, 2009) ("[T]he accused must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offense.").

the product of political negotiation. There was no intent on the part of the negotiating parties to restrict customary international law in the Rome Statute. In Article 25(3)(d)(ii), the Rome Statute specifies a knowledge *mens rea* for those assisting crimes committed by a group acting with a common purpose. Thus, the ICC may interpret this provision, applicable to the facts of this case, to require a *mens rea* of knowledge, not purpose.[38]

The Second Circuit relied on the language of Article 25(3)(c) of the Rome Statute in adopting its "purpose" standard. (App. A-31) Significantly, the provision the Second Circuit relied on has not yet been interpreted by the ICC, nor has the relationship between this provision and Article 25(3)(d)(ii) been established. Thus, the precise *mens rea* for aiding and abetting liability in the Rome Statute is at best uncertain, leaving no basis to conclude that this standard was intended to supersede the established customary international law standard of knowledge.[39]

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[38] *See* Gerhard Werle, *Principles of International Criminal Law* ¶¶ 306-307, 330 (2005); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 314 (2008).

[39] In Article 22(3) the Rome Statute explicitly states that its definition of crimes "shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

IV. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE SECOND AND ELEVENTH CIRCUITS OVER THE AVAILABILITY OF FEDERAL COMMON LAW CONSPIRACY LIABILITY UNDER THE ATS.

The Second Circuit also rejected plaintiffs' federal common law conspiracy claim under a similar two-step analysis. First, it held that international law governed this issue. Second, it held that the *mens rea* for any conspiracy theory of liability under international law was purpose. On this basis, it affirmed the summary judgment because it found that plaintiffs had not made an adequate showing of purpose. (App. A-2) Both aspects of this analysis are incorrect.

Review is, therefore, necessary for the same reasons set forth in § I, *supra*: (1) the Second Circuit's adoption of international law is in direct conflict with the same line of Eleventh Circuit decisions adopting federal common law civil conspiracy liability, and is inconsistent with *Sosa*; and (2) the Second Circuit's analysis of conspiracy liability under international law was erroneous.

As the Eleventh Circuit repeatedly has held, federal common law supplies the standard for civil conspiracy liability in ATS cases. *See Cabello,* 402 F.3d at 1159.[40] Federal common law precedents

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[40] The Eleventh Circuit has applied this standard in ATS cases. *See, e.g., Sinaltrainal*, 578 F.3d at 1267-69; *Aldana*,

apply here for the same reasons they apply to aiding and abetting liability. *See* § I, *supra*. Common law conspiracy liability does not require a showing of "purpose." In *Halberstam*, the D.C. Circuit found the co-defendant common law wife liable for conspiracy because she had knowledge of the criminal activities and was a willing partner in his criminal activities. 705 F.2d at 486.

Talisman's actions fit the requirements of civil conspiracy exactly. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) ("To be liable as a conspirator you must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them."). Talisman entered into a common venture with the GOS. The exploration and development of oil was a lawful act, but it was implemented through the deliberate commission of systematic human rights violations with the support of the joint venture partners. Talisman knew about most of these acts, but it did not need to have complete knowledge. These violations were carried out to further the common venture and caused the plaintiffs' injuries. The human rights violations were done pursuant to the common scheme. There is no requirement that each conspirator share a common purpose or specifically

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416 F.3d at 1248.

intend that any particular violation or injury occur. A conspirator can regret that innocent people are harmed by the common venture and still be liable as a conspirator.

Even if international law, rather than federal common law, supplies the standard for conspiracy or joint criminal enterprise liability, review is necessary to determine the mental element for such liability under the ATS.[41] Under the Rome Statute, a defendant's contribution to the commission of a crime by a group of persons acting with a common purpose may be the basis of criminal liability if it is done with *knowledge* of the group's intention to commit the crime. Rome Statute, art. 25(3)(d)(ii) (emphasis added).[42] The Second Circuit did not explain why it relied on the Rome Statute to find that the *mens rea* for aiding and abetting liability is purpose while ignoring the provisions of the Rome Statute specifiying a *mens rea* of knowledge for group action for a joint criminal enterprise liability. This inconsistency underscores the need for review so this Court can articulate the proper international law standard if that source of law provides the standard.

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[41] The Second Circuit recognized joint criminal enterprise as the international law equivalent of conspiracy liability. (App. A-33)

[42] *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. Unv. J. Int'l Hum Rts. 304 (2008).

CONCLUSION

For all of these reasons the petition should be granted.

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Respectfully submitted,

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